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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 236

RICHARD MORFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 766

EDWARD K. BARSKY, et al.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF COMMITTEE FOR A DEMOCRATIC FAR EASTERN POLICY, AS AMICUS CURIAE

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INTRODUCTORY STATEMENT

The Committee for a Democratic Far Eastern Policy is an organization composed of writers, educators, trade union leaders, lawyers, scientists and many well-known figures in American public life. The Chairman of the organization from its inception to the time of his death was Brigadier General Evans F. Carlson. The program of the organization favors the establishment of a policy towards the peoples of the Far East which will be conducive to peace and mutually beneficial trade and other relations

between the American people and the peoples of the Far East.

Having in mind that the issues involved in these three cases are of vital general concern, particularly for an organization in the field of governmental policy concerned with the right of freedom of opinion, of the right to disagree, the Committee respectfully requests leave to submit the following brief amicus curiae, to which the attorneys for the parties have consented.

FREEDOM OF OPINION

The opinion of the Court below in the case of Richard Morford makes patent some of the inherent dangers in the course now being pursued. In essence, the Court equates being "consistently critical of the foreign policy of the United States" with an attack on the principle of our form of government. The Committee for a Democratic Far Eastern Policy has, for example, pointed out over a period of time since V-J Day that a policy of intervention in the internal affairs of China would necessarily fail. The Truman Administration has, however, pursued a contrary policy. In the White Paper "United States Relations with China" the State Department admitted that its past policy was ill-conceived and foredoomed to failure. Yet, despite this, the Committee for a Democratic Far Eastern Policy would, on the basis of the criteria enunciated in the opinion of the Court below in the Morford case, be deemed to have attacked the principle of our form of government. Furthermore, the assumption that a Congressional Committee may require the production from any organization of any or all of its papers or documents solely on the ground that such papers or documents might contain something of interest to the Committee is prohibited by the Fourth Amendment. See *Federal Trade Commission* v. *United States Tobacco Company*, 264 U. S. 299. Very little would be left of the "right to be let alone", Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 487.

On the surface, these cases involve merely individuals in organizations. At bottom, however, the issues are of fundamental constitutional importance. The objectives of the Committee on Un-American activities by its terms of reference and as constituted and applied basically involve an assertion and exercise of unlimited power uncircumscribed by and not pertinent to constitutional legislative purposes. The right of free speech and association granted by the Constitution would depend on the caprices of a host of government officials who would, from time to time, approve such activities as they saw fit.

The essential design of the constitutional fabric is the principle of popular sovereignty, of government only by the consent of the governed. Its warp and woof is the doctrine that the will of the people themselves is primary to the aims and policies of any group of public officials. And the realization of that principle, the implementation of the primacy of popular will over governmental authority, depends upon the impotence of such authority to mold that will. "Authority here", said Mr. Justice Jackson (writing for this Court in *Board of Education* v. *Barnette*, 319 U. S. 624, 641) "is to be controlled by public opinion, not public opinion by authority."

Public opinion, popular will, is determined by what people hear, read and see, by the manner in which they interpret their own experiences and what they can learn of the experiences of others, by the interchange of ideas, by analysis, argument, and agitation. Were the government empowered to affect the course of that determination—by granting official favor to one set of ideas, as against another, by obstructing the expression of one point of view and facilitating the expression of others, by harassing and suppressing those with whom it disagreed—it could in essence fix the ultimate determination itself. Given the power to influence and direct thought and its expression, government could reverse the maxim enunciated by Justice Jackson, could control public opinion instead of being controlled by it, could endow itself with the substance of

despotic power. For then would the wielders of governmental authority be responsible in fact to themselves alone; by enslaving the popular will, they could usurp the popular sovereignty, and become, not the servants but the masters of the people.

Those who fought a bitter, bloody struggle to gain their freedom and independence sought a safeguard against making such a mockery of their sacrifice. They were wary of the temptations of governmental power. They were determined to prevent so easy a subversion of the democratic institutions they were establishing in the Constitution. Accordingly, they insisted upon the incorporation in that document of a specific prohibition against the invasion by government of the area of thought and expression. They sought, by the agency of the First Amendment, to guarantee the inviolability of the mind and will of every American against governmental intervention in any form.

The First Amendment is thus the very foundation of our republican form of government. It is the "matrix, the indispensable condition" of all our other liberties, of every institution of our democracy.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." (*Board of Education* v. *Barnette*, supra at p. 642.)

But the present cases confront us with nothing less than an effort to eclipse that star. Here we have a statute which purports by its terms to endow a group of public officials—a Committee of Congress—with the power to prescribe what shall be orthodox in matters of public and private life and opinion. Here we have the spectacle of a group of public officials acting under that statute proclaiming its peculiar definitions of heresy in economic, social and political doctrine, bestowing its favor upon individuals and groups which meet its standards of propriety, thundering its condemnation of those with whom it disagrees, and re-

quiring citizens either to avow the orthodoxy or to confess the heresy the Committee has defined.

To be sure the statute and its creature do not use the terms "orthodoxy" or "heresy": their characterizations are framed in terms of "loyal" and "subversive", "American" and "Unamerican". They do not refer to "social, political, and economic doctrine"; the term "propaganda" serves as a substitute. But the meaning, the content is the same. What we have is a group of officials who presume to announce what is right or wrong, acceptable or unacceptable, for Americans to think and write and say. With Congressional approval, they have set themselves up as the definitive interpreters of good and bad American thought. They have assumed the prerogative of applying the seal of official approval to the tenets of certain individuals and groups and to brand others with the stigma of "subversive". Is this not the official prescription of orthodoxy? Surely, the one fixed star in our constitutional constellation does not fade before an artful epithet.

Upon what basis can such a body, acting in such flagrant violation of the constitutional precepts announced by this court be permitted to exist? Surely, the failure of the statute to set forth criminal penalties for the Committee-defined heresy is not decisive. This Court has said that "no official, high or petty, can *prescribe* what shall be orthodox". (Emphasis added.) Congress may not punish heresy or "Unamericanism", for the simple reason that it lacks the power to prescribe that which is to be punished. It is the prescription to which this Court referred, and the lack of power to punish is but a corollary to the lack of power to prescribe.

Moreover, the First Amendment provides broadly that Congress shall make *no law abridging* freedom of thought or expression. It does not confine its proscription to abridgments enforced by fine or imprisonment or injunction. It does not wilt in the face of other repressive devices. This Court has said many times that the Constitution was designed to keep abreast of the times; it must do

so above all with regard to its safeguards against the incursions of despotism.

And in our time, the most devastating of such incursions was accomplished to a large extent by the very technique with which we are concerned. In the Nazi system of repression, the Ministry of Information and Propaganda under Herr Goebels had a peculiar and vital place. Its function was not to punish. It confined itself to declaring publicly what was "Aryan" or "Unaryan", good or bad for a German to say, to read, to see. It defined those writings and speeches and persons and organizations which were acceptable to government and those which were taboo. And it relied upon other public and private agencies to impose the sanctions for its "informational" edicts. Those whom it condemned could expect to be discharged from their jobs, ostracized from social intercourse, subjected to humiliation and violent assault, to prosecution for any conceivable technical offenses. But the Ministry itself was in the clear—its function was simply to "expose" and to "inform."

Is that not precisely the function of the Committee with which we are here concerned? It too publishes its taboos and relies on other agencies for the imposition of sanctions. Those whom it finds objectionable are publicly vilified, slandered, and harassed. Individuals who associate themselves with persons or organizations characterized by the Committee as "Un-American" become the objects of suspicion, of official and unofficial investigation, find themselves deprived of the opportunity for public and private employment, hindered in the pursuit of every normal channel for the fulfillment of their lives. It is indeed the aim of the Committee to destroy organizations with whose purposes the Committee disagrees (such as that in whose behalf this brief is filed), by making persons fearful of participating in its efforts.

There is no room for subtlety here. Stripped of nice technicalities we are presented with a crude effort on the part of an agency of government to cast public opinion in the narrow mold that agency has itself prepared. We

are faced with the exercise by a group of public officials of a prerogative never before assumed in our entire history — that of formulating for every American standards of thought and expression and association and of compelling conformity to these standards under pain of penalties. We are confronted by a group of men who propose to foist upon us an iron clad censorship of every organ of expression, of every cultural and political form. We are faced with the persecution of individuals who courageously challenge the power of any official to compel their acceptance of those standards of thought, who refused to submit to an inquisition in those spheres wherein the Constitution grants them immunity from governmental intrusion.

CONCLUSION

This Court is being asked to vindicate the guarantees of the First Amendment from an encroachment by the Federal Congress. If our constitutional liberties are to retain the life and vitality with which they were originally invested, these convictions should be set aside.

These issues which go to the very foundation of our democracy are presented in each of the petitions herein. Their decision will have a vital bearing not only upon the petitioners but also on countless people and groups whose freedoms are at stake. Indeed, the substance of the First and Fourth Amendments will be vitally affected by the outcome of these cases. We deem it crucial to the national welfare that this Court grant the petitions herein.

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